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No. 02-34

IN THE

Supreme Court of the United States

SOUTHWESTERN ILLINOIS DEVELOPMENT AUTHORITY,
Petitioner,

v.

NATIONAL CITY ENVIRONMENTAL, L.L.C., and ST. LOUIS AUTO SHREDDING COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois

RESPONDENTS' BRIEF IN OPPOSITION

JESSIE K. LIU
JENNER & BLOCK, LLC
601 13th Street, N.W.
Suite 1200 South
Washington, D.C. 20005
(202) 639-6000

JEROLD S. SOLOVY
Counsel of Record
BARRY LEVENSTAM
JEREMY M. TAYLOR
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether certiorari should be granted to review a ruling of the Illinois Supreme Court, where that ruling was squarely based on the public use protections of Illinois's Constitution and prior case law.

2. Whether certiorari should be granted to review a ruling striking the proposed taking in this case, where that ruling was crafted to address (a) an atypical set of facts in which the condemning authority admitted that the taking was for a private developer's "private use" and (b) a statutory grant of quick-take authority that the Illinois legislature is permitting to expire at the end of August 2002.

RULE 29.6 STATEMENT

National City Environmental, L.L.C. has no parent corporations, and no publicly held company owns ten percent or more of its stock.

St. Louis Auto Shredding Company has no parent corporations, and no publicly held company owns ten percent or more of its stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

1. Background Facts 3
2. The Taking At Issue Here 6
3. The Trial Court Proceedings 8
4. The Illinois Appellate Court Proceedings 9
5. The Illinois Supreme Court Proceedings 9

REASONS FOR DENYING THE PETITION 11

I. The Result Below Rests Upon The Illinois Supreme Court's Interpretation Of The Illinois Constitution 12

II. This Highly Fact-Specific Case Does Not Present Any Broad-Reaching Issues Of Law 20

III. The Ruling Of The Illinois Supreme Court Is Consistent With Case Law From This Court And Other Jurisdictions 22

TABLE OF CONTENTS – continued

Page

IV. The Illinois Legislature's Refusal To Renew SWIDA's Quick-Take Power Weighs Against Review 26

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Berman v. Parker, 348 U.S. 26 (1954) 18, 20, 22, 24

Black v. Cutter Laboratories, 351 U.S. 292 (1956) 17

California v. Freeman, 488 U.S. 1311 (1989) (O'Connor, J., in chambers) 17, 19

City of Center Line v. Chmelko, 416 N.W.2d 401 (Mich. Ct. App. 1987) 24

City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982) 18

City of Statesville v. Roth, 336 S.E.2d 142 (N.C. Ct. App. 1985) 25

Coleman v. Thompson, 501 U.S. 722 (1991) 19

Dominion Land Co. v. United States, 269 U.S. 55 (1925) 18

Forest Preserve District v. West Suburban Bank, 641 N.E.2d 493 (Ill. 1994) 13

Gaylord v. Sanitary District, 68 N.E. 522 (Ill. 1903) 11, 15, 16, 17

Harris v. Reed, 489 U.S. 255 (1989) 19

Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) 13, 18, 23

Herb v. Pitcairn, 324 U.S. 117 (1945) 12

Jankovich v. Indiana Toll Road Commission, 379 U.S. 487 (1965) 18

TABLE OF AUTHORITIES – continued

Page

Limits Industrial Railroad Co. v. American Spiral Pipe Works, 151 N.E. 567 (Ill. 1926) ... 15, 17

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 18

Mayor of Vicksburg v. Thomas, 645 So. 2d 940 (Miss. 1994) 25

Michigan v. Long, 463 U.S. 1032 (1983) 19

Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) 15, 16

National Railroad Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407 (1992) 24

Pennsylvania v. Labron, 518 U.S. 938 (1996) 15

Port Authority v. Groppoli, 202 N.W.2d 371 (Minn. 1972) 24, 25

State ex rel. Tomasic v. Unified Government of Wyandotte County/Kansas City, 962 P.2d 543 (Kan. 1998) 22, 23

State Highway Commission v. Thornton, 156 S.E.2d 248 (N.C. 1967) 25

Taggart v. Weinacker's Inc., 397 U.S. 223 (1970) .. 21, 26

United States ex rel. Tennessee Valley Authority v. Welch, 327 U.S. 546 (1946) 18

Wilmington Parking Authority v. Land with Improvements, 521 A.2d 227 (Del. 1986) 24

TABLE OF AUTHORITIES – continued

Page

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) 12

STATUTES AND CONSTITUTION

U.S. Const., amend. V 13

U.S. Const., amend. XIV 13

Ill. Const. art. I, § 15 (1970) 13, 14

Ill. Const. art. VIII, § 1(a) (1970) 14

65 ILCS 5/11-74.4-1 *et seq.* 22

70 ILCS 520/8(b) 4, 23

315 ILCS 5/1 *et seq.* 22

735 ILCS 5/7-103 4

735 ILCS 5/7-103.70 ..... 4, 26

735 ILCS 5/7-111 23

735 ILCS 5/7-123 23

MISCELLANEOUS

Cynthia Wilson, *SWIDA Is Losing Its Quick-Take Authority*, St. Louis Post-Dispatch, July 22, 2002 ..... 4, 26

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RESPONDENTS' BRIEF IN OPPOSITION

Addressing what amounted to a sale by the Southwestern Illinois Development Authority ("SWIDA") of its "quick-take" condemnation authority to a private developer seeking land to build a private parking lot to maximize its private corporate revenues, the Illinois Supreme Court held that taking to violate the "public use" protection of the Illinois Constitution. Review of that state-law ruling is beyond this Court's jurisdiction.

Even if the ruling below could be read as being based on the Fifth Amendment, and thus lacking an

"independent and adequate state ground," review still would not be warranted. Given the extreme and unusual facts of this case, the Illinois Supreme Court's ruling that the taking was not for a "public use" is unassailable. Because of those unique facts, a decision by this Court would have very limited precedential value.

STATEMENT OF JURISDICTION

This Court lacks jurisdiction to hear this case because the Illinois Supreme Court's decision rests upon adequate and independent state grounds. *See* Section I, *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The primary constitutional provision at issue is Illinois Constitution art. I, § 15 (1970), which provides: "Private property shall not be taken or damaged for public use without just compensation as provided by law." Because SWIDA argued below that the terms "public use" and "public purpose" were synonymous under Illinois law, also relevant is Illinois Constitution art. VIII, § 1(a) (1970), which uses the broader term "public purpose" rather than "public use": "Public funds, property or credit shall be used only for public purposes."

STATEMENT OF THE CASE

At the core of this litigation is the proposed condemnation of property owned by petitioners National City Environmental and St. Louis Auto Shredding (collectively "NCE"), through SWIDA's statutory "quick-take" authority. Gateway International Raceway ("Gateway"), a private corporation and NCE's neighbor,

initiated that condemnation after determining that it needed more parking to host bigger auto races and that it could expand its parking in the least expensive manner by paying SWIDA to condemn NCE's land. Gateway obtained SWIDA's pre-printed "quick-take" application form, indicated on this application that it is a "private developer" seeking to condemn NCE's land for its own "private use," and then paid SWIDA the fee SWIDA demands for condemning land for "private developers" for their own "private use." After executing a contract that allowed Gateway to specify the property to be condemned in exchange for paying not only SWIDA's fee but all of SWIDA's costs, including the just compensation and all attorneys' fees, SWIDA condemned NCE's property. The petition before this Court arises from the Illinois Supreme Court's determination that this sale of SWIDA's taking power exceeded its authority and violated the "public use" protections of the Illinois Constitution.

1. Background Facts.

For a quarter-century, NCE has operated a recycling center in its current location, employing between 80 and 100 people in recycling metals from old cars and appliances. The recycling process generates plastic and fabric waste materials, which are placed in NCE's environmentally sound landfill. Pet. App. A-3. In a year or two, when NCE fills its current landfill, it plans to move its landfill operations to an adjacent 148.5 acre site – the land that SWIDA sought to take here. *Id.* NCE also currently uses that site as a source of clay and dirt to cover and cap off the existing landfill. *Id.*

In 1987, the Illinois General Assembly created SWIDA, 70 ILCS 520/1 *et seq.* (the "SWIDA Act"), giving it certain powers, including the power to acquire property "upon condemnation" subject to the restrictions of the Illinois Eminent Domain Act. 70 ILCS 520/8(b). Originally, the SWIDA Act included an expedited version of the condemnation power called "quick-take." *See* 735 ILCS 5/7-103; *see also* 735 ILCS 5/7-103.70 (permitting SWIDA to exercise "quick-take" authority). The General Assembly chose not to reinstate that authority when it lapsed in September 1994, because SWIDA had abused that power. In 1995, the General Assembly decided to restore SWIDA's quick-take power, but did so only by placing certain new restrictions on that power. *See* 70 ILCS 520/8(b). According to the legislator who proposed the reinstatement, these additional restrictions were needed "to restore the public trust in this organization."[1] NCE Br. A-26.[2]

Gateway, NCE's neighbor to the east, was for years a small motorsports track. In 1994, after an ownership change, Gateway undertook a major expansion, including the building of the supporting infrastructure to

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1/ The General Assembly recently adjourned until November 7, 2002, without renewing SWIDA's quick-take authority, which expires on August 30, 2002. *See* Cynthia Wilson, *SWIDA Is Losing Its Quick-Take Authority*, St. Louis Post-Dispatch, July 22, 2002, at p. MC1.

2/ NCE's Brief on the Merits, filed with the Illinois Supreme Court on March 1, 2000, and the accompanying Appendix are cited herein as "NCE Br. __." NCE's Petition for Rehearing, filed with the Illinois Supreme Court on May 10, 2001, is cited as "NCE Pet. __." The trial transcripts below are cited, by volume, as "V_. __." Defense Exhibits are cited as "Def. Ex. __."

accommodate 50,000 spectators. Gateway sought and obtained over $21 million in financing assistance from SWIDA to facilitate this project. Pet. App. A-2 to A-3.

By early 1997, Gateway's expansion project was only a few months from completion. Suddenly deciding it lacked sufficient space for parking, in February 1997 Gateway asked SWIDA to condemn land belonging to Charles Lukas, an elderly local farmer. Pet. App. A-96. At the same time, Gateway treated SWIDA's Executive Director to free tickets to every major racing event in 1997 and hosted him at Gateway's Hospitality Suite at the Raceway. Def. Exs. 9, 10, 11; V1. 132-35.

Gateway's request, which SWIDA ultimately granted, was counter to SWIDA's policy at the time, which limited its takings to those requested by local governmental units. Consequently, SWIDA changed its policies to allow condemnations initiated at the behest of private parties. Pet. App. A-96. SWIDA's new "Quick-Take Application Packet" stated that SWIDA was willing to condemn property for "private uses," and set out a "schedule of fees" SWIDA would charge for such "private" condemnations. Pet. App. A-4, A-15; NCE Br. A-12. Although SWIDA charged no fee when the "government" applied for SWIDA to take land for a "public use," if a "private developer" asked SWIDA to take land for a "private use," the developer had to pay a "non-refundable" fee of $2,500 plus a "sliding scale fee" set at a percentage of the value of the subject property. Pet. App. A-4.

2. The Taking At Issue Here.

A year after the Lukas taking, Gateway decided that it wanted more parking to become eligible to seek a Winston Cup race for its racetrack. Pet. App. A-3. Gateway could have built a multi-level parking facility on its own property, but decided that doing so would be "too expensive" because such a facility "wouldn't be used enough to make it pay" for itself, despite the fact that this additional parking would enable Gateway to take in $13 to $14 million more in gate receipts annually. Pet. App. A-8, A-16. As SWIDA admitted at trial, the idea to condemn NCE's land was Gateway's – not SWIDA's. V1. 84.

On February 20, 1998, Gateway applied to SWIDA to quick-take NCE's land and convey it to Gateway for use as additional racetrack parking (for which it would charge the public). Pet. App. A-4; NCE Br. A-23. Gateway's application expressed no interest in alleviating traffic congestion, improving safety, or eliminating slums or blight. Instead, Gateway candidly stated that it sought NCE's land for use as a paid parking lot for the purpose of "further increasing the value of [Gateway's] racetrack." Pet. App. A-4, A-94; NCE Br. A-23. When asked at trial if he wanted NCE's land because he was trying to make money, Gateway's CEO answered: "Absolutely." V2. 114-15.

On March 5, 1998, SWIDA held a hearing on Gateway's request that SWIDA take NCE's property "for the purpose [according to SWIDA's own Notice of Hearing] of providing parking for Gateway." Pet. App. A-4 to A-5. At that hearing, SWIDA authorized the taking

of NCE's land for Gateway, including the filing of a "quick-take" action. *Id.* Before this hearing, SWIDA had not studied whether this taking would improve the local economy, whether it might alleviate safety problems, or whether it would eliminate slums or blight. Pet. App. A-15, A-97.

Before the March 5 hearing, SWIDA and Gateway had signed a contract in which SWIDA agreed to take NCE's land and convey title to Gateway. NCE Br. A-43. In this contract, SWIDA agreed to "utilize its eminent domain and quick-take authority" to condemn whatever land "may be desired . . . by Gateway" and to give that land to Gateway within five days. *Id.* SWIDA also agreed not to make any offer for NCE's land higher than any Gateway offer without obtaining Gateway's "prior written approval," and not to use any consultants or appraisers unless they were "approved by Gateway." *Id.*

In addition to SWIDA's $2,500 application fee, Gateway was to pay SWIDA a $60,000 "sliding scale fee," and $1 million to cover the potential acquisition cost of NCE's land (ultimately, whatever the jury found to be just compensation). Pet. App. A-4; V1. 88-89, 99-100. As SWIDA admitted, Gateway made these payments pursuant to SWIDA's fee schedule for takings by "private developers" for their own "private use." Pet. App. A-95. The contract also required Gateway to fund all of SWIDA's expenses in connection with the taking, including its legal fees. Thus, no public funds were used for this taking. Pet. App. A-4; NCE Br. A-43.

On March 17, 1998, almost a month after submitting its quick-take application to SWIDA, Gateway sent a letter to NCE offering $1 million for the 148.5 acre target property, $6,734 per acre, and giving NCE 48 hours to accept or reject the offer. Pet. App. A-5. Land immediately across Route 203 from the target property sold for over $250,000 per acre at about the same time. NCE declined the offer on March 19. *Id.* On March 20, 1998, with Gateway's approval and as an "extension" of Gateway's prior offer, SWIDA repeated the $1 million offer Gateway had made. *Id.* SWIDA also threatened to initiate a condemnation action on March 31, 1998 if NCE did not accept the offer by March 30. NCE did not accept, and SWIDA filed its condemnation action. Pet. App. A-5 to A-6.

3. Trial Court Proceedings.

The quick-take hearing began on April 21, 1998. On April 27, the circuit court denied the challenges raised by NCE, finding that SWIDA had the authority to take NCE's land and had exercised that authority properly. Pet. App. A-6. On April 30, following a preliminary compensation hearing, the circuit court adopted SWIDA's $900,000 valuation of NCE's land and ordered title in NCE's land transferred to SWIDA. Pet. App. A-8. NCE filed its notice of appeal and a stay motion that day. Pet. App. A-9. SWIDA quit-claimed the property to Gateway the same day. *Id.* Although the circuit court denied the stay, the Illinois Appellate Court issued one, thus preventing Gateway from paving the contested land.

4. The Illinois Appellate Court Proceedings.

The Illinois Appellate Court reversed, holding that SWIDA had "exceeded its constitutional authority" by taking NCE's property. Pet. App. A-100. The court noted that "in Illinois it is well settled that the courts have a right to render the final decision" on the question of public use. Pet. App. A-89. After analyzing the applicable Illinois precedent, the court stated that "[i]mplicit in the cases cited by both parties is the principle that though land can be taken for a proper public use, taking private property for private use under the law of eminent domain is in direct contravention of article 1, section 15, of the Illinois Constitution." Pet. App. A-99. Distinguishing this case from urban renewal cases, where Illinois law requires a finding of blight, which was never made in this case, the Court held that "[t]he expansion of Gateway parking is a private use, rather than a public use." *Id.*

5. The Illinois Supreme Court Proceedings.

Although the Illinois Supreme Court initially ruled for SWIDA by a vote of 4-3, a majority of the voting justices had joined the Court between oral argument and the decision. In light of that change in personnel, the Court granted NCE's petition for rehearing and heard oral argument again. On rehearing, the Court voted 5-2 to affirm the Appellate Court, and held that the exercise of the eminent domain power is "subject to the state constitutional mandate" that private property may only be taken for a "public use." Pet. App. A-1, A-9. The Court made clear that this question did not turn solely on

SWIDA's transfer of the targeted property to Gateway, but instead on whether that transfer served a public use:

> The essence of this case relates not to the ultimate transfer of property to a private party. Rather, the controlling issue is whether SWIDA exceeded the boundaries of constitutional principles and its authority by transferring the property to a private party for a profit when the property is not put to a public use.

Pet. App. A-11.

The Illinois Supreme Court concluded that the facts of this case compelled a ruling that the proposed taking was for a private, not a public, use. Pet. App. A-15 to A-16. The Court rejected SWIDA's argument that the taking was justified by safety concerns, "especially in light of evidence that Gateway could have built a parking garage structure on its existing property" to alleviate any claimed problems. Pet. App. A-13 to A-14. The Court also held that the record established that no slums and blight existed on the property. Pet. App. A-13. The Court held that SWIDA here acted solely for the benefit of Gateway:

> While the activities here were undertaken in the guise of carrying out its legislative mission, SWIDA's true intentions were not clothed in an independent, legitimate governmental decision to further a planned public use. . . . Rather, this action was undertaken solely in response to Gateway's expansion goals and its failure to accomplish those goals through purchasing NCE's land at an acceptable negotiated price. It appears SWIDA's true intentions were to act

> as a default broker of land for Gateway's proposed parking plan.

Pet. App. A-15 to A-16.

The Court rejected SWIDA's argument that there is no distinction between the terms "public purpose" and "public use" – terms used distinctly in separate provisions of the Illinois Constitution. To the contrary, the Court held that this "distinction still exists and is essential to this case." Pet. App. A-12. Specifically, the Court held that the Illinois Constitution demands that "to constitute a public use, more than a mere benefit to the public must flow from the contemplated improvement." Pet. App. A-14 (quoting *Gaylord v. Sanitary Dist.*, 68 N.E. 522, 524 (Ill. 1903)). The Court thus reaffirmed that the Illinois public use doctrine requires that "[t]he public must be to some extent entitled to use or enjoy the property, not as a mere favor or by permission of the owner, but by right." Pet. App. A-13 (quoting *Gaylord*, 68 N.E. at 524). Because SWIDA's proposed taking of NCE's property did not meet this standard, it did not pass muster under the Illinois Constitution.

REASONS FOR DENYING THE PETITION

Because the decision of the Illinois Supreme Court rests on independent and adequate state grounds, this Court lacks jurisdiction to review it. A fair reading of the Illinois Court's opinion leaves no doubt that it was based on Illinois law and that Illinois law was not substantially affected by the Court's citation of federal cases. There is, therefore, no dispositive federal issue for this Court to consider.

Even assuming that the ruling below could be interpreted as resting on an interpretation of the federal Constitution, there is no reason for this Court to become involved. Review by this Court would serve little purpose because a decision based on the extreme and unusual facts shown here would have minimal precedential value. Certainly the Illinois Supreme Court's ruling does not call into question any traditional condemnations undertaken by public agencies exercising proper governmental functions.

Finally, on the merits, the Illinois Supreme Court did nothing controversial. If ever the "public use" limitation of the Fifth Amendment could come into play, this would be the case: where a governmental agency put its condemnation authority up for sale to a private corporation seeking property to enhance its private profits.

I. The Result Below Rests Upon The Illinois Supreme Court's Interpretation Of The Illinois Constitution.

This Court "from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945); *see Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 566 (1977) ("[O]ur only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.") (quoting *Herb*, 324 U.S. at 125-26). That principle is fully applicable here. The Illinois Supreme Court plainly relied on Illinois state law interpreting the Illinois Constitution to bar an Illinois state agency from taking property to benefit a private corporation. Indeed, from the first words of its Analysis Section, the Court

made clear that it would decide this case on state law and relegate federal law to a subordinate role:

> The State of Illinois, as a sovereign, has the inherent right to condemn property, *subject to the state constitutional mandate* that private property shall not be taken or damaged for public use without just compensation to its owner. Ill. Const. 1970 art. I, § 15; *Forest Preserve District v. West Suburban Bank*, 161 Ill. 2d 448, 455 (1994). The fifth amendment to the United States Constitution (U.S. Const., amend. V), made applicable to the states through the fourteenth amendment (U.S. Const., amend. XIV), *also* provides that private property shall not be taken for public use without just compensation. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 231, 81 L. Ed. 2d 186, 191, 104 S. Ct. 2321, 2324 (1984).

Pet. App. A-9 to A-10 (emphasis added).

For the substance of its analysis, the Illinois Supreme Court relied on Illinois *state* cases interpreting the Illinois *state* Constitution. Specifically, the Court relied upon those state authorities in rejecting SWIDA's assertion that "any distinction between the terms 'public purpose' and 'public use' has long since evaporated and that the proper test is simply to ask whether a 'public purpose' is served by the taking," Pet. App. A-12. Instead, the Court held that "a distinction still exists and is essential to this case." *Id.*

That distinction is firmly rooted in the *Illinois Constitution*, which *does* distinguish between "public purpose" and "public use." The Illinois Constitution

specifies that some government actions need be justified only by a public *purpose*, while others require a public *use*. Article VIII, Section 1(a), governing the use of public money and credit, provides that "[p]ublic funds, property or credit shall be used only for *public purposes*." Ill. Const. art. VIII, § 1(a) (1970) (emphasis added). In contrast, the Illinois Constitution's Takings Clause mandates that "[p]rivate property shall not be taken or damaged for *public use* without just compensation." Ill. Const. art. I, § 15 (1970) (emphasis added).[3]

As the Illinois Supreme Court noted, Illinois courts have interpreted "public purpose" as a flexible, expansive phrase, but have insisted that the Illinois Takings Clause's

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3/ NCE vigorously argued the "public use" versus "public purpose" distinction under the Illinois Constitution to the Illinois Supreme Court. For example, NCE specifically asserted that in Illinois "[t]he term 'public purpose' has a broader scope than the term 'public use'":

> Even if some courts occasionally have used the terms "public use" and "public purpose" interchangeably, our State's Constitution uses the two terms quite distinctly: Article VIII, § 1(a), which governs the use of public money and credit, provides that "[p]ublic funds, property or credit shall be used only for public *purposes*." Ill. Const. art. VIII, § 1(a) (1970) (emphasis added). This language differs markedly from the takings clause, which mandates that "[p]rivate property shall not be taken or damaged for public *use* without just compensation." Ill. Const. art. I, § 15 (1970) (emphasis added). Thus, in Illinois, a "public purpose" cannot justify taking private property for a "private use."
>
> As discussed in NCE's Brief before this Court, the distinction that our Constitution draws between "public use" and "public purpose" makes a material difference in this case. (NCE Br. 28-33.)

NCE Pet. 19-20.

"public use" requirement is satisfied only when the public is "to some extent entitled to enjoy the property, not as a mere favor or by permission of the owner, but by right." Pet. App. A-13 (quoting *Gaylord v. Sanitary Dist.*, 68 N.E. 522, 524 (Ill. 1903)). Following this interpretation of the Illinois Constitution, the Illinois Supreme Court here ruled that the taking at issue did not satisfy Illinois's public use requirement because, under Illinois law, "to constitute a public use, something more than a mere benefit to the public must flow from the contemplated improvement." Pet. App. A-14 (quoting *Gaylord*, 68 N.E. at 524).

The Illinois Supreme Court also ruled that the taking in this case was not for a public use because "members of the public are not the primary intended beneficiaries of this taking." Pet. App. A-14 to A-15. In so concluding, the Court relied heavily on its decision in *Limits Industrial Railroad Co. v. American Spiral Pipe Works*, 151 N.E. 567 (Ill. 1926), which held that a railroad could not exercise eminent domain authority to acquire property for the purpose of expanding its facilities because the taking "principally benefitted the railroad itself and a few other business entities." Pet. App. A-14.

Accordingly, the only reasonable reading of the case at bar is that the Court rested its ruling entirely on state law. Nor is the challenged decision "interwoven" with federal law so as to confer jurisdiction upon this Court. *See Pennsylvania v. Labron*, 518 U.S. 938, 940-41 (1996) (Pennsylvania Supreme Court decision was interwoven with federal law because, although that court discussed several of its own decisions, some of those cases relied on federal precedent); *Milkovich v. Lorain Journal Co.*, 497

U.S. 1, 10 n.5 (1990) (Ohio Supreme Court decision was interwoven with federal law because the state court precedent on which it relied in turn "relied heavily on federal decisions interpreting the scope of First Amendment protection accorded defamation defendants").

In contrast, the state precedents on which the Illinois Supreme Court relied do not turn on federal law. *Gaylord* contains only a single reference to federal case law – within a citation from a treatise discussing cases from various non-Illinois jurisdictions for a point *unrelated* to the public use question. 68 N.E. at 524-25. Moreover, the *Gaylord* opinion repeatedly emphasizes that that decision is rooted in the Illinois Supreme Court's interpretation of *Illinois* law. For example, it states explicitly:

> It is also the settled doctrine *of this court* that, to constitute a public use, something more than a mere benefit to the public must flow from the contemplated improvement. The public must be to some extent entitled to use or enjoy the property, not as a mere favor or by permission of the owner, but by right.

Id. at 524 (emphasis added). *Gaylord* concludes:

> We are clearly of the opinion that, in so far as the statute of 1872 attempts to authorize the condemnation of private property for the purposes of public mills or machinery other than public gristmills, it is violative of that provision of *our Constitution* which declares that private property shall not be taken or damaged for public use without just compensation, the meaning of which is that private property shall be

> taken for no other than a public use, and then only upon the payment of just compensation . . . .

Id. at 526 (emphasis added). Plainly, *Gaylord* is based entirely on the Court's interpretation of the Illinois Constitution.

Likewise, *Limits Industrial* – which the Illinois Supreme Court described as "strikingly similar" to this case in that the taking at issue ran afoul of the public use requirement because it principally benefitted private entities, Pet. App. A-14 – contains not a single citation to federal law. There can be no question that *Limits Industrial*'s interpretation of the public use requirement is based wholly on the Illinois Constitution.

The fact that the Illinois Supreme Court's opinion also cites to five of this Court's cases – two merely as part of a string cite – does not mean that its decision rests upon federal law. This Court looks beyond federal case citations to identify the basis for a state court's decision and refuses review if that basis is an independent and adequate state ground: "[W]e should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds." *Black v. Cutter Labs.*, 351 U.S. 292, 298 (1956); *see California v. Freeman*, 488 U.S. 1311, 1314 (1989) (O'Connor, J., in chambers) (finding that a decision rested on independent and adequate state grounds where "[d]iscussion of federal law – specifically the First Amendment – is strictly confined to the second subsection and constitutes an independent, alternative holding"). Applying this principle, this Court ruled that an Indiana Supreme Court decision rested upon an independent and adequate state

ground, even where the decision cited both federal and state cases, because "the organization and language of the opinion" indicated that the state court relied on state law. *Jankovich v. Indiana Toll Road Comm'n*, 379 U.S. 487, 491 (1965).

The Illinois Supreme Court cited these few federal cases – typically in conjunction with state precedent – for unremarkable background information concerning governmental takings powers generally.[4] Indeed, the dissent criticizes the Court's opinion for not hewing to this Court's precedents. Pet. App. A-29 to A-30. The Illinois Supreme Court, however, is within its authority to require a creature of Illinois statute seeking to condemn Illinois property to conform to Illinois law. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 291-93 (1982) (holding that a state court may read the state constitution

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4/ *E.g.*, Pet. App. A-10 (citing *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984), for proposition that federal Constitution, like Illinois Constitution, provides that private property shall not be taken for public use without just compensation and that transfer of property taken by eminent domain to private ownership does not by itself render the taking unconstitutional); Pet. App. A-10 to A-11 (citing *Berman v. Parker*, 348 U.S. 26 (1954), for statement that takings for public use are permissible under the constitutionally exercised police power of the government); Pet. App. A-11 (citing *Berman*, 348 U.S. at 31-32; *Dominion Land Co. v. United States*, 269 U.S. 55, 66 (1925); and *United States ex rel. Tennessee Valley Auth. v. Welch*, 327 U.S. 546, 552 (1946), for principle that deference should be afforded legislature's grant of eminent domain authority); Pet. App. A-11 (citing *Midkiff*, 467 U.S. at 241, for fact that exercise of eminent domain power is not beyond judicial scrutiny); Pet. App. A-17 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982), for proposition that "the government does not have unlimited power to redefine property rights").

as providing greater protections for individual rights than the federal Constitution).

It is true that where "a state court decision fairly appears to rest primarily on federal law," this Court will assume that it does absent a plain statement to the contrary. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (emphasis added). But where it does *not* "fairly appear that the state court rested its decision primarily on federal law," that presumption does not apply. *Coleman v. Thompson*, 501 U.S. 722, 736 (1991) (internal citation and quotation omitted); *see Harris v. Reed*, 489 U.S. 255, 261 (1989) (describing *Long* presumption as applying only in those cases in which it fairly appears that state court rested its decision primarily on federal law). A fair reading of the Illinois Supreme Court's opinion reveals that its decision stemmed wholly from its application of its own precedent interpreting its own Constitution. Hence, the *Long* presumption is inapposite here.

Finally, this Court will not review a case where, even after it corrected any misapprehension of federal law, a state court would render the same decision on remand. *Freeman*, 488 U.S. at 1314. That would happen here. As the Illinois Supreme Court found, the taking below neither permitted use of the property by the public as of right nor principally benefitted the public, two requirements that the Illinois Constitution imposes for a taking to be for a public use. Pet. App. A-13 to A-15. Therefore, even if this Court were to grant certiorari and hold that the taking was permissible under the federal Constitution, it still would run afoul of the Illinois Constitution, as the Illinois Supreme Court recognized. Certiorari should be denied.

II. This Highly Fact-Specific Case Does Not Present Any Broad-Reaching Issues Of Law.

Even assuming that the decision below could be interpreted as resting on federal law, there would be no persuasive reason for this Court to review it. This Court has refused to adopt a bright-line test for what is and is not a "public use," expressly because this Court has recognized that the public use determination is *fact-specific*, as "each case must turn on its own facts." *Berman v. Parker*, 348 U.S. 26, 31-32 (1954); *see also* Pet. App. A-11 (quoting same).

The uniqueness of the facts shown here cannot be denied. As the Illinois Supreme Court explained, *SWIDA's own application form* accurately described this taking as one undertaken at the request of a "*private developer*" for that developer's "*private use*." Pet. App. A-15 (emphasis added). The following highly unusual facts also informed that Court's analysis:

- "SWIDA did not conduct or commission a thorough study of the parking situation at Gateway. Nor did it formulate any economic plan requiring additional parking at the racetrack."
- "SWIDA advertised that, for a fee, it would condemn land at the request of 'private developers' for the 'private use' of developers."
- "SWIDA entered into a contract with Gateway to condemn whatever land 'may be desired . . . by Gateway.'"

- The taking had no basis in SWIDA's economic planning function, but rather "was undertaken solely in response to Gateway's expansion goals and its failure to accomplish those goals through purchasing NCE's land at an acceptable negotiated price."

- Gateway "could have built a parking garage structure on its existing property," but the cost of doing so was "substantially higher" than that of building an open field parking lot on land taken by SWIDA from NCE.

See Pet. App. A-15 to A-16.

Even were there some room for doubt whether these extreme facts suffice under federal law to render the taking a non-public use (there is not, *see* Section III *infra*), a ruling based on these facts would not elucidate the application of the Takings Clause to normal governmental operations. Governments very seldom broadcast a willingness to do the bidding of private companies for a set price, dressing up actions only after the fact as measures promoting public safety and economic development. The proper constitutional treatment of that atypically inappropriate governmental behavior simply is not a question of general import. *See Taggart v. Weinacker's Inc.*, 397 U.S. 223, 225 (1970) (dismissing certiorari as improvidently granted where legal question was "overshadowed by the special facts of the case").

III. The Ruling Of The Illinois Supreme Court Is Consistent With Case Law From This Court And Other Jurisdictions.

The unique facts of this case, on which the Illinois Supreme Court relied, easily distinguish this case from those of this Court and other states cited by SWIDA as "conflicting." Pet. 11-18. Moreover, SWIDA is incorrect in its assertion that other states have forsaken the public use protections afforded landowners – though Illinois need not conform its decisions to those of other states. Pet. 16-17. In fact, numerous comparable rulings have been issued in other states.

Trying to make this decision appear aberrant, SWIDA first compares this case to cases that involved the elimination of slums and blight. *See Berman*, 348 U.S. 26 (upholding constitutionality of District of Columbia blighted areas redevelopment statute); *State ex rel. Tomasic v. Unified Gov't of Wyandotte County/Kansas City*, 962 P.2d 543 (Kan. 1998) (taking pursuant to Kansas's tax increment financing ("TIF") statute). But as the Illinois Supreme Court specifically found, "we are not dealing with a taking for the purposes of eliminating slums or blight." Pet. App. A-13.

Indeed, the facts reveal that SWIDA here did not act pursuant to Illinois's Blighted Areas Redevelopment Act, 315 ILCS 5/1 *et seq.*, or its Tax Increment Allocation Redevelopment Act, 65 ILCS 5/11-74.4-1 *et seq.*, both of which provide carefully crafted legislative safeguards for finding that blight exists. The "blight" cases SWIDA cites differ in this factual respect as well. *See Berman*, 348 U.S. at 29-30, 35-36 (detailing procedural requirements of the

District of Columbia's blighted areas act); *Tomasic*, 962 P.2d at 557 (noting that taking under Kansas's TIF Act had to follow extensive "safeguards" designed "to check any abuse of executive power").

The other case on which petitioner primarily relies is *Midkiff*, but that case is significantly different as well, both procedurally and substantively. First, unlike here, where the Court is being asked to review a single abusive taking invalidated by a state supreme court, *Midkiff* involved invalidation by a federal court of an entire state legislative scheme. Far from trampling on legislative authority, the decision at issue here is fully consistent with the Illinois Eminent Domain Act, which the General Assembly requires SWIDA to follow. *See* 70 ILCS 520/8(b). That Act not only contemplates judicial oversight of takings, but provides Illinois courts with the power to remedy unauthorized takings by ordering a condemnor defeated on appeal to pay the landowner's costs and legal fees. *See* 735 ILCS 5/7-111; 735 ILCS 5/7-123.

Moreover, *Midkiff* addressed the constitutionality of the Residential Leaseholds Act of 1967, legislation intended to break up the oligopoly of Hawaii's land ownership structure, which still reflected the pre-statehood feudal practice in which a single high chief owned all of the land. 467 U.S. at 232. The Illinois Supreme Court addressed a decision by a local political authority to take property from one business and give that property to a second business that had developed a cozy relationship with the authority, for the purpose of enhancing its already-considerable private corporate profits. The justification that was sufficient in *Midkiff* thus differs

dramatically from the absence of legitimate justification shown here.[5]

Other states have rejected takings where, as here, the condemning body has no actual interest in the target property other than to convey title to a private party. In *Wilmington Parking Authority v. Land with Improvements*, 521 A.2d 227, 233-34 (Del. 1986), for example, the Delaware Supreme Court rejected a taking by a Parking Authority for a public parking facility, where the Authority intended to transfer a substantial portion of the target property to a private company, because the "paramount benefit" of the taking was going to a private company. *See also City of Center Line v. Chmelko*, 416 N.W.2d 401, 403-07 (Mich. Ct. App. 1987) (striking taking where City claimed that it sought to condemn property "for commercial purposes in a manner that will improve the economic viability of the existing commercial district," when in fact it intended to convey condemned land to auto dealership that wanted to expand its parking space).

Similarly, in *Port Authority v. Groppoli*, 202 N.W.2d 371, 372 (Minn. 1972), a private company sought to acquire waterfront property for warehouse use. Rather than negotiate to purchase the property from the landowner, the company convinced the Port Authority to condemn the property and make it available by lease. The

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5/ SWIDA also cites *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407 (1992), merely for the proposition that it "reaffirmed" the "*Berman/Midkiff* analysis." Pet. 13. That *National Railroad* did not overturn *Berman* or *Midkiff* is unremarkable – particularly given that it was decided under federal law *alone* – and adds nothing to SWIDA's Petition.

Authority did just that, and prevailed over the landowner at trial. The Minnesota Supreme Court reversed, holding that it was obligated "to prevent an abuse of discretion in those cases where an owner's constitutional rights are threatened by a proposed taking for a private rather than a public purpose." *Id.* at 375. The Court concluded that "[t]his is such a case," because the principal beneficiary of the taking would be a single private corporation. *Id.*; *see also Mayor of Vicksburg v. Thomas*, 645 So. 2d 940, 943 (Miss. 1994) (taking rejected where private company paid the City over $4 million to acquire property on ground that the "private use of [the] property . . . will be paramount, not incidental, to the public use and any public benefit from the taking will be speculative at best"); *City of Statesville v. Roth*, 336 S.E.2d 142, 144 (N.C. Ct. App. 1985) (striking condemnation and holding that a private citizen's land "cannot be taken from him by eminent domain and turned over to the private use of a wealthy individual or corporation merely because the latter may be expected to spend more money in the community") (quoting *State Highway Comm'n v. Thornton*, 156 S.E.2d 248, 260 (N.C. 1967)).

In sum, there is no basis for petitioner's hyperbolic claims that the Illinois Supreme Court has defied governing constitutional principles. Even assuming that the Court's decision rested on federal law, the federal "public use" requirement is doubtless violated where a governmental entity essentially sells its condemnation power to private parties, without exercising any real oversight over when and why that power is used.

IV. The Illinois Legislature's Refusal To Renew SWIDA's Quick-Take Power Weighs Against Review.

The Illinois General Assembly recently concluded its session without renewing SWIDA's quick-take power, which lapses August 30, 2002. 735 ILCS 5/7-103.70; *see also* Cynthia Wilson, *SWIDA Is Losing Its Quick-Take Authority*, St. Louis Post-Dispatch, July 22, 2002, at p. MC1. Far from objecting to the Illinois Supreme Court's decision to invalidate SWIDA's exercise of quick-take authority, the General Assembly has ratified that decision by refusing to allow SWIDA to continue to exercise quick-take authority. In other words, the Petition in this case does not represent the State of Illinois, through its legislature or Attorney General, seeking to vindicate its takings powers or seeking guidance for future takings. Rather, it is Gateway, the private corporation paying counsel's fees and expenses, to whom SWIDA is contractually bound, seeking one last chance to obtain its inexpensive parking lot from NCE.

In *Taggart*, 397 U.S. at 224-25, this Court dismissed as improvidently granted a writ of certiorari where changed circumstances did not moot the controversy but relieved "the threat of grave state-federal conflict that we need sit to resolve." Although this case presents no issue worthy of this Court's review, SWIDA's loss of the statutory quick-take power at issue is another, prudential reason to deny the writ.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Jerold S. Solovy
Counsel of Record
Barry Levenstam
Jeremy M. Taylor
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

Jessie K. Liu
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Suite 1200 South
Washington, D.C. 20005
(202) 639-6000

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